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RE N HISHAM N MOHD KAMAL; EX P AMFINANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
B [BANKRUPTCY NOTICE/PETITION NO: D1-29-4831-2003]
8 OCTOBER 2008

BANKRUPTCY: *Bankruptcy notice - Filing of - Whether the applicable law at time of presentation of petition was pre amended s. 5 Bankruptcy Act 1967 - Interpretation Acts 1948 and 1967, s. 30(1)(a)*

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STATUTORY INTERPRETATION: *Amending legislation - Effect of - Filing of bankruptcy notice done when pre amended s. 5 Bankruptcy Act 1967 still in force - Applicability - Interpretation Acts 1948 and 1967, s. 30(1)(a)*

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This was an appeal by the debtor against the decision of the senior assistant registrar dismissing the debtor's application to strike out the creditor's petition. The creditor had obtained a judgment in default against the debtor and filed a request to issue
E a bankruptcy notice in respect of the judgment debt. The bankruptcy notice was served on the debtor but the debtor failed to comply with the bankruptcy notice. The creditor's petition was then filed and served on the debtor. It was to be observed that at the time of the filing of the request to file a bankruptcy notice,
F that was 26 August 2003, the law that was in force then was the pre-amended s. 5 of the Bankruptcy Act 1967, meaning that the debt owing must at least be RM10,000. However, at the time the petition was filed on 27 January 2005, s. 5 of the Bankruptcy Act 1967 had been amended. The debtor submitted that the
G applicable law was the amended s. 5 of the Bankruptcy Act 1967, meaning that the minimum amount owing must be RM30,000. The debtor argued that the amount owing herein was RM22,463.21, that was less than RM30,000, therefore the creditor's petition ought to be set aside. However, the creditor submitted that the
H applicable law at the time of the presentation of the petition was still the pre-amended s. 5 and not the amended s. 5 of the Bankruptcy Act 1967. Therefore, the creditor argued that the applicable law should be the law as it stood at the time of the filing of the request for the issuance of the bankruptcy notice and

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that was 26 August 2003. Hence, the question that arose: what was the applicable law that governed the presentation of the petition herein.

Held (dismissing the appeal):

(1) The applicable law should be the law as it stood at the time when the bankruptcy notice was filed in court by the creditor that was on 26 August 2003. The words "affect … anything duly done … thereunder" in s. 30(1)(a) of the Interpretation Acts 1948 and 1967 of the Interpretation Acts mean that since the filing of the bankruptcy notice in the instant case was done when the pre-amended s. 5(1)(a) was still in force, therefore, the applicable law would still be the pre-amended s. 5(1)(a). The applicability of the pre-amended s. 5(1)(a) was also preserved by the words 'affect any right … acquired … under the repealed law' in limb (b) of subsection (1); and further by the words 'affect any…legal proceeding … in respect of any such right …' in limb (d) of the same subsection. The creditor had already 'acquired' a 'right' to a 'legal proceeding' in bankruptcy against the debtor when the creditor filed the bankruptcy notice on the said date. That right being the right to serve the bankruptcy notice on the debtor and thereafter to file and serve the creditor's petition on the debtor in the event of failure on the part of the debtor to comply with the bankruptcy notice. (paras 14 & 18)

Case(s) referred to:

J Raju M Kerpaya v. Commerce International Merchant Bankers Berhad [2000] 3 CLJ 104 ***(disst)***

Re Tan Boon Ser Ex P Mui Finance Bhd [1998] 2 CLJ Supp 60 ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), (2), 5(1)(a)
Bankruptcy (Amendment) Act 2003, s. 5(1)(a)
Bankruptcy Rules 1969, rr. 91(1), 92
Interpretation Acts 1948 and 1967, ss. 3, 30(1)(a)

For the creditor - Aznim Adha; M/s Raja Nor & Su Lin
For the debtor - SC Lum; M/s Lum Chee Seng & Assoc

Reported by Suhainah Wahiduddin

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JUDGMENT

Hishamudin Mohd Yunus J:

[1] Enclosure 24 is an appeal by the debtor against the decision of the learned senior assistant registrar given on 31 May 2007. The senior assistant registrar, in her decision, had dismissed the debtor's application to strike out the creditor's petition dated 27 January 2005.

[2] The creditor had obtained a judgment in default against the debtor on 22 August 2000 at Kuala Lumpur Magistrate's Court. The creditor then filed a request to issue a bankruptcy notice on 26 August 2003 in respect of the judgment debt. An order to extend the validity of the bankruptcy notice and to serve the same by way of substitute service was obtained on 9 April 2004.

[3] The bankruptcy notice was served on the debtor by way of substituted service, that is to say, by way of advertisement in the Malay Mail on 9 July 2004; and by posting at the debtor's last known address and at the notice board of the High Court in Kuala Lumpur on 13 July 2004. The debtor failed to comply with the bankruptcy notice. The creditor's petition was filed on 27 January 2005 and served on the debtor.

[4] I have dismissed the appeal with costs and I shall now give my grounds.

[5] The requirement for a bankruptcy notice is prescribed by s. 3(1)(i) and (2) of the Bankruptcy Act 1967 which provides:

> **3. Acts of bankruptcy.**
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> (1) A debtor commits as Act of bankruptcy in each of the following cases:
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> ...
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> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the Federation, or by leave of the court elsewhere, a bankruptcy notice under this act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and

he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order given leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

(2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of noncompliance therewith and shall be served in the prescribed manner:

Provided that a bankruptcy notice -

(i) may specify an agent to Act on behalf of the creditor in respect of any payment or other thing required by the notice to be made to or done to the satisfaction of the creditor; and

(ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

[6] Rules 91(1) and 92 of the Bankruptcy Rules 1969 provide:

91. What Court to issue

(1) a bankruptcy notice shall be issued by the Court in which a bankruptcy petition against the debtor may subsequently be filed.

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A **92. Issue of notice**

When applying for the issue of a bankruptcy notice, the creditor shall –

(a) produce to the Registrar an office copy of the judgment or
B order on which the notice is founded;

(b) file the notice, together with a request for issue;

(c) lodge sufficient number of copies of the bankruptcy notice to be sealed and issued for service.

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[7] Prior to the amendment of the Bankruptcy Act 1967 by the Bankruptcy (Amendment) Act 2003 (Act A 1197), s. 5(1)(a) of the Bankruptcy Act states:

5. Conditions on which creditor may petition

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(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless –

(a) the debt owing by the debtor to the petitioning creditor,
or if two or more creditors join in the petition the aggregate
E amount of debts owing to the several petitioning creditors, amounts to ten thousand ringgit;

[8] Section 5(1)(a) of Bankruptcy Act 1967 as amended by Act A1197 provides:

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5. Conditions on which creditor may petition

(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless –

G (a) the debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors, amounts to thirty thousand ringgit;

[9] The above amendment came into force on 1 October 2003.
H It is to be noted that, by the amendment, the requirement as to the amount of debt owing by the debtor, before a creditor's petition can be presented, has been increased from RM10,000 to RM30,000.

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[10] It is to be observed that at the time of the filing of the request to file a bankruptcy notice, that is, 26 August 2003, the law that was in force then was the pre-amended s. 5, meaning that the debt owing must at least be RM10,000. However, at the time the petition was filed on 27 January 2005, s. 5 had been amended by Act A1197 such that the minimum amount owing must be RM30,000. Hence the question now arises: What is the applicable law that governs the presentation of the petition in the present case? Is it the pre-amended s. 5? Or, is it the amended s. 5?

[11] The learned counsel for the debtor/appellant submits that the applicable law is the amended s. 5, meaning that the minimum amount owing must be RM30,000. The learned counsel argues that since in the present case the amount owing is only RM22,463.21, that is to say, less than RM30,000, therefore, the creditor's petition ought to be set aside. The learned counsel refers to the case of *J Raju M Kerpaya v. Commerce International Merchant Bankers Berhad* [2000] 3 CLJ 104. With respect, I find this case not relevant for the purpose of the issue at hand.

[12] The learned counsel for the creditor/respondent, on the other hand, submits that the applicable law at the time of the presentation of the petition was still the pre-amended s. 5 and not the amendment s. 5. The learned counsel argues that the applicable law should be the law as it stood at the time of the filing of the request for the issuance of the bankruptcy notice and that is 26 August 2003. The learned counsel refers to s. 30 of the Interpretation Acts 1948 and 1967 and the case of *Re Tan Boon Ser, Ex P Mui Finance Bhd* [1998] 2 CLJ Supp. 60.

[13] In *Re Tan Boon Ser*, s. 5(1)(a) of the Bankruptcy Act 1967 was amended by the Bankruptcy (Amendment) Act 1992 so as to increase the quantum from RM2,000 to RM10,000, and the amendment came into force on 17 July 1992. In that case, the debtor filed the bankruptcy notice on 26 May 1992 for the sum of RM8,115.94. The creditor's petition was filed after the coming into force of the amendment, that is to say after 17 July 1992. The question arose as to whether the filing of the creditor's petition was valid as the debt was less then RM10,000. The court held that, s. 30 of the Interpretation Acts of 1948 and 1967 applies and that the applicable law would be the law at the time when the bankruptcy notice was issued (or filed) and that was the pre-amended s. 5(1)(a) of the Act.

[14] With respect, I am in agreement with the learned counsel for the creditor/respondent that the applicable law should be the law as it stood at the time when the bankruptcy notice was filed in court by the creditor that is, on 26 August 2003. I so hold by reason of s. 30 of the Interpretation Acts 1948 and 1967 and also by reference to *Re Tan Boon Ser*.

[15] Section 30 of the Interpretation Acts provides:

> **30. Matters not affected by repeal**
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> (1) The repeal of a written law in whole or in part shall not:
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> (a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or
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> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
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> (c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or
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> (d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,

[16] The word 'repeal' is defined in s. 3 of the Interpretation Acts as:

> "repeal" includes rescind, revoke, cancel and replace;

[17] I hold that, by virtue of the definition above, the amendment of s. 5(1) of the Bankruptcy Act by Act A1197 is a "repeal of a written law ... in part ..." for the purpose of s. 30 of the Interpretation Acts.

[18] Section 30 of the Interpretation Acts is a saving provision. The purpose of this provision is to avoid any legal chaos whenever a legislation is repealed or amended. The words "affect ... anything duly done ... thereunder" in s. 30(1)(a) of the Interpretation Acts mean that since the filing of the bankruptcy notice in the instant case was done when the pre-amended s. 5(1)(a) was still in force, therefore, the applicable law will still be the pre-amended s. 5(1)(a). The applicability of the pre-amended s. 5(1)(a) is also preserved by the words "affect any right ... acquired ... under the

repealed law" in limb (b) of subsection (1); and further by the words "affect any … legal proceeding … in respect of any such right …" in limb (d) of the same subsection. In my judgment, the creditor had already "acquired" a "right" to a "legal proceeding" in bankruptcy against the debtor when the creditor filed the bankruptcy notice on 26 August 2003. That right being the right to serve the bankruptcy notice on the debtor and thereafter to file and serve the creditor's petition on the debtor in the event of failure on the part of the debtor to comply with the bankruptcy notice.

[Appeal dismissed with costs.]